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June 12, 2019

VIA EMAIL AND UPS NEXT DAY AIR

PERB Board Members
Public Employment Relations Board
1031 18th Street
Sacramento, CA 95811-4124

Mr. Felix De La Torre
Public Employment Relations Board
1031 18th Street
Sacramento, CA 95811-4124

Re: SEIU California's Written Comments Regarding Draft Revisions to
Regulations Being Considered at June 13, 2019 PERB Board Meeting

Dear PERB Board Members and Mr. De La Torre:

These comments are submitted on behalf of SEIU California, which has over 750,000 members, approximately 550,000 of whom serve in the public sector.

SEIU California supports the draft proposed regulations scheduled for consideration at the June 13, 2019 PERB Board Meeting. SEIU California writes to substantiate its support for two specific aspects of those drafts.

1. Proposed Amendments Regarding Subpoenas, Motions, and Authority of
Board Agents

SEIU California writes particularly to support the addition of PERB Regulation 32150(h), which would codify long-settled decisional law. PERB already has the authority to draw adverse inferences based on a responding party's failure to comply with a valid subpoena. Codifying precedent regarding this subject would provide clarity and consistency.

Because PERB cannot directly enforce its own subpoenas through a contempt order, existing PERB regulations authorize the Board to apply to a superior court for such enforcement. (PERB Regulation 32150(f) (Board "may" seek enforcement).) A Board agent shall recommend to the General Counsel that the Board seek enforcement only "[i]f the Board agent deems it appropriate." (*Id.*) But there is no requirement that the General Counsel act on a Board agent's recommendation. The Board is required to seek enforcement only on the General Counsel's recommendation, and even then need not do so if it determines that seeking enforcement would be "inconsistent with law or the policies of the applicable Act." (*Id.*) In short, when a party fails to comply with a subpoena, the Board may seek enforcement in court, but need not do so.

When the Board does not seek to enforce a subpoena, it has discretion to draw an inference adverse to the party that failed to comply. (*Regents of the University of California* (1987) PERB Dec. No. 640-H, p. 9; *see also Cupertino Union School*

District (1989) PERB Dec. No. 764, p. 52.) This accords with California Evidence Code § 413. (*Id.*; Evid. Code § 413.) The rule that withholding evidence “gives rise to an inference that the evidence is unfavorable” is simply “common sense.” (*UAW v. NLRB* (1972) 459 F.2d 1329, 1335-36.) The general rule can be traced to 18th century jurisprudence and has gained “widespread acceptance.” (*Id.* at 1336.) It comports with the PERB Board’s role as a trier of fact in labor disputes. (*See* Gov’t Code § 3509.5(b); *Boling v. PERB* (2018) 5 Cal.5th 898, 912.)

Furthermore, the PERB Board’s authority to draw an adverse inference when a party fails to comply with a subpoena is consistent with federal law interpreting the NLRA. (*See, e.g., Bannon Mills, Inc.* (1964) 146 NLRB 611, 633-35.) Indeed, the D.C. Circuit found reversible error where the National Labor Relations Board refused, without sufficient justification, to apply the adverse inference rule. (*UAW, supra*, 459 F.2d at 1339-42.)

Finally, the PERB Board’s existing discretion to draw an adverse inference against a noncompliant party does not create unfair prejudice. The Board does not draw automatic or reflexive inferences, but considers “both the record as a whole and the proffered rationale for noncompliance.” (*Regents, supra*, PERB Dec. No. 640-H at p. 11.) In other words, although a party’s noncompliance suggests that the withheld evidence is unfavorable, a party with a good-faith objection is afforded an opportunity to explain it. If the Board rejects that explanation, there is no injustice in drawing the conclusion that a bad explanation covers bad facts. If the party believes the Board’s conclusion is unsupported, it has the option of requesting judicial review. (Gov’t Code § 3509.5.)

In short, the Board’s authority to draw an inference against a party that refuses to comply with a subpoena makes practical sense. The rule is long-standing because its application results in economies both for the tribunal and the parties. For example, the Formal Hearing can proceed as scheduled without delay, and PERB need not petition to a court unless circumstances truly necessitate it. SEIU California therefore respectfully urges the Board to approve proposed Regulation 31250(h).

2. Proposed Regulations on Filing Requirements

SEIU California also supports the proposed addition to PERB Regulation 32700 (Proof of Support), which would authorize PERB to accept electronically-signed proof of employee support submitted in connection with a petition for certification or request for recognition. SEIU California applauds PERB’s effort to modernize its practices. The proposed Regulation 32700(e)(5) is a step in the right direction. We welcome further discussion and consideration beyond the June 13, 2019 PERB Board meeting regarding PERB’s acceptance of electronic signatures in this context. SEIU California may submit further comments at a later point in this process.

SEIU California suggests that when the PERB Board finalizes the language for this proposed regulation, such language regarding electronic signatures also should be added to PERB Regulation 61020 (MMBA-specific regulation defining Proof of Support), PERB Regulation 81020 (Trial Court Act-specific regulation defining Proof of Support) and PERB Regulation 91020 (Court Interpreter Act-specific regulation defining Proof of Support).

Thank you for your consideration of these comments.

Sincerely,

A handwritten signature in blue ink that reads "Kerianne R. Steele". The signature is written in a cursive style with a large initial "K".

Kerianne R. Steele

KRS:sm

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